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No. 83-1646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SIBLEY, LINDSAY & CURR CO., A DIVISION OF ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

v.

BAKERY, CONFECTIONERY & TOBACCO WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,

and

BAKERY AND CONFECTIONERY UNION AND INDUSTRY INTERNATIONAL PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS BAKERY, CONFECTIONERY & TOBACCO WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO AND BAKERY AND CONFECTIONTERY UNION AND INDUSTRY INTERNATIONAL PENSION FUND IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) violates the due process requirements of the Fifth Amendment by imposing retroactive withdrawal liability upon employers who withdrew from multiemployer pension plans prior to the MPPAA's enactment.

2. Whether the procedural provisions of the Multiemployer Pension Plan Amendments Act of 1980 violate due process requirements.

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STATUTES:

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, *et seq.*, codified at 29 U.S.C. § 1381, *et seq.* 2

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Respondents Bakery, Confectionery & Tobacco Workers International Union of America, AFL-CIO (hereinafter "Union") and Bakery and Confectionery Union and Industry International Pension Fund (hereinafter "Fund") respectfully request that the certiorari petition of Sibley, Lindsay & Curr Co. (hereinafter "Sibley") be held pending decision in *PBGC v. R.A. Gray & Co.*, No. 83-245, and disposed of in accordance with that decision.

OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved are adequately set forth in the Petition and its Appendices.

STATEMENT OF THE CASE

At issue in this case is the constitutionality of the retroactive withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, *et seq.*, codified at 29 U.S.C. § 1381, *et seq.* (hereinafter "MPPAA"). In order to discourage opportunistic withdrawals from multiemployer pension funds while legislation fixing liability for unfunded pension benefits was being considered, Congress enacted a retroactive effective date for the withdrawal liability rules created in MPPAA.

Numerous courts have found that MPPAA is a rational, constitutional exercise of the legislative power. Petitioner Sibley has attacked the statute because it withdrew during the retroactive "window," and is required by MPPAA to bear its share of unfunded pension benefits. In the Judgment appealed from in this case, the Second Circuit upheld the constitutionality of the statute. The Second Circuit's opinion is reproduced in the Petition at Appendix A 1-28.

The Second Circuit also rejected Sibley's other constitutional challenges to the statute (e.g., vagueness, arbitration procedures, *etc.*). All of Sibley's rejected claims have risen again in its Petition. The Court is respectfully referred to the Petition, Appendix A 19-27, for the Court of Appeals' description and analysis of these claims.

The Fund disagrees with many of the assertions in Petitioner's argumentative Statement of the Case. (Petition at 3-8). However, in the interest of brevity, the

Fund notes that the Court of Appeals correctly states the essential facts in its opinion. (Petition at A 5-6).

REASONS FOR DENYING THE WRIT

I. The Court Recently Heard Argument On A Case Raising The Only Significant Question In The Petition.

Petitioner correctly identifies a conflict in the Circuit Courts of Appeals as to the constitutionality of the retroactive withdrawal liability provisions of MPPAA.[1] On April 16, 1984, the Court heard argument on this exact issue in *PBGC v. R.A. Gray & Co.*, No. 83-245.[2] Clearly, the Court need not increase its workload by revisiting the identical issue in this case.

Petitioner also suggests that its Petition has merit because the Courts of Appeals disagree as to the correct standard of review for retroactive federal legislation. (Petition at 11) Whatever disagreement may exist will

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[1] The Second, Fourth, Seventh, and District of Columbia Circuits have upheld the statute. *See The Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, No. 83-1313 (D.C. Circuit March 27, 1984) (post enactment withdrawal); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir. 1984) (consolidated with this case); *Peick v. PBGC*, 724 F.2d 1247 (7th Cir. 1983) *pet. for cert. filed*, No. 83-1246 (52 U.S.L.W. 3583, January 31, 1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83, etc.*, 718 F.2d 628 (4th Cir. 1983) *pet. for cert. filed*, No. 83-541 (52 U.S.L.W. 3293, September 29, 1983). Only the Ninth Circuit has held the statute unconstitutional as applied to employers that withdrew from multiemployer pension plans prior to its date of enactment. *Shelter Framing Corp. v. PBGC*, 705 F.2d 1502 (9th Cir.) *prob. jur. noted sub nom. PBGC v. R.A. Gray & Co.*, 104 S. Ct. 271 (October 17, 1983); *pet. for cert. granted sub nom. Carpenters Pension Trust v. Shelter Framing Corp.*, No. 83-507 (52 U.S.L.W. 3268, September 24, 1983); *pet. for cert. filed sub nom. G&R Roofing Co. v. Carpenters Pension Trust*, No. 83-702 (52 U.S.L.W. 3387, October 26, 1983).

[2] *PBGC v. R.A. Gray* was set down for argument with No. 83-291, *Oregon-Washington Carpenters-Employers Pension Trust Fund v. R.A. Gray & Co.*

necessarily be resolved when the Court publishes its decision in *PBGC v. R.A. Gray & Co.* Thus, Petitioner's second reason for granting the writ is also without merit.

Petitioner Sibley also argues that pending action in *R.A. Gray* will not affect this case because of a factual distinction. (Petition at 13) Unlike the employer in *R.A. Gray*, Sibley alleges that it entered into a written agreement describing all of its obligations to its employees' Union as a result of the closing of its bakery. The written agreement was signed by Sibley and the Union prior to MPPAA's enactment date.

The suggested distinction is immaterial to the constitutional issue. The statute is no more retroactive because Sibley signed a description of its obligations. Without the agreement, the statutory obligations would be the same. Moreover, Sibley's agreement with the Union in no way affected the Fund. The Fund was not a party to the closing agreement, which did not even purport to deal with withdrawal liability.

Petitioner's suggested distinction is no more than a claim that an employer may alter the scope of future legislation by entering into a private contract. Were that the case, many employers would immediately negotiate contractual disclaimers of future legislation. But the Court has emphatically rejected that notion in cases of state and federal legislation. "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) (Holmes, J.); "Immunity from federal regulation is not gained through forehanded contracts." *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947), *quoted in FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

In short, Respondents submit that *PBGC v. R.A. Gray & Co.* will answer the question posed by this Petition.

II. Petitioner's Remaining Questions Present No Important Issue Deserving The Court's Attention.

Petitioner also seeks review of the Second Circuit's judgment on a variety of constitutional challenges to the MPPAA procedures for assessment, collection, and final resolution of disputes over withdrawal liability. Sibley objects to (1) the statutorily prescribed method for initial determination of withdrawal liability, and (2) procedures for trustee, arbitral and court review of such determinations. (Petition at 16-27)

Despite the existence of numerous MPPAA precedents, Sibley neglects to inform the Court of the rulings that reject these same arguments in the MPPAA context. *See, e.g., Republic Industries, supra,* 718 F.2d at 639-42; *Peick v. PBGC, supra,* 724 F.2d at 1277; *Washington Star Co., supra,* slip op. at 18-19. In fact, the courts are unanimous in upholding the statute against these claims. *See, e.g., Washington Star Co.* v. *Int'l Typographical Union, etc.,* 4 BNA Employee Benefits Cases 1145, 1152-53 (D.D.C. 1983), *aff'd,* No. 83-1313 (D.C. Circuit March 27, 1984) (and cases cited). Sibley's failure to identify any conflict in the lower courts on these issues greatly undercuts its Petition.

Instead of identifying a conflict in the Circuits, Sibley alleges that these issues deserve the Court's attention because the Second Circuit disregarded "established precedent." (Petition at 16) The Second Circuit's analysis of Sibley's claims faithfully follows this Court's landmark decisions on each issue. A comparison of the Petition and the Second Circuit's opinion reveals that each of Petitioner's arguments is fully and properly rejected. (Petition App. A 19-27) Petitioner identifies no special or important issue requiring this Court's attention.

CONCLUSION

For the foregoing reasons, Respondents Bakery, Confectionery & Tobacco Workers International Union of America, AFL-CIO and Bakery and Confectionery Union and Industry International Pension Fund respectfully submit that the Petition for a Writ of Certiorari should be held pending a decision in *PBGC v. R.A. Gray* and disposed of in accordance with that decision.

Respectfully submitted,

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